1983

Doris C. Rucker v. Dale E. Rucker : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

DORIS C. RUCKER, Plaintiff-Respondent, -v- DALE E. RUCKER, Defendant-Appellant.	Case No. 18991

BRIEF OF APPELLANT

Appeal from Judgment and Decree and the adverse ruling on Appellant's Motion to set aside judgment of the Fourth Judicial District in and for Utah County

Honorable George E. Ballif, Judge

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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DORIS C. RUCKER, :

Plaintiff-Respondent, :

vs. : Case No. 18991

DALE E. RUCKER, :

Defendant-Appellant. :

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment and decree and the adverse ruling on Appellant's Motion to Set Aside Judgment, in the Fourth Judicial District Court, in and for Utah County, the Honorable George E. Ballif, presiding. This appeal is pursuant to Rule 72 of the Utah Rules of Civil Procedure.

DISPOSITION IN THE LOWER COURT

The court below entered a default judgment and decree of divorce in the above-entitled matter on November 18, 1981. Subsequently, appellant and respondent, by and through their then respective counsel, stipulated and agreed to set aside the default judgment in certain particulars. On December 23, 1982, the court entered a decree awarding respondent child support and items of real and personal property.

On January 5, 1983, appellant moved the court to set as[illegible] the decree rendered on December 23, 1982, which motion was d[illegible] on January 26, 1983.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the denial of his Motion to s[illegible] aside the default judgment and decree below and a remand to t[illegible] lower court for a trial on the merits.

STATEMENT OF THE FACTS

On November 12, 1981, a hearing on a default proceeding in [illegible] divorce action brought by respondent against Plaintiff was held [illegible] the Fourth Judicial District Court, the Honorable George E. Ball[illegible] presiding. The court awarded respondent a decree of divor[illegible] consistent with the respondent's complaint (R.20,28-30).

Subsequently, respondent retained counsel and at that ti[illegible] counsel for appellant and counsel for respondent stipulated an[illegible] agreed to set aside the default judgment with regard to certa[illegible] particulars (R.31). Initially, the court refused to sign th[illegible] order based on the stipulation and agreement to set aside t[illegible] default judgment and decree (R.32).

However, on Januray 26, 1982,counsel for appellant an[illegible] counsel for respondent met in informal conference in Judg[illegible] Ballif's chambers. The court granted the stipulation with regar[illegible] to the distribution of real and personal property, and alimon[illegible] but left intact the decree of divorce divorcing appellant a[illegible] respondent, awarding to respondent the custody of the partie[illegible]

minor child, and ordering appellant to pay child support for the minor child in the amount of two hundred fifty dollars monthly (R.33).

On November 12, 1982, counsel for appellant, Nick Colessides, moved to withdraw as counsel, which motion was granted. The court advised appellant to obtain the services of new counsel, and ordered the trial date of November 30, 1982 vacated, and reset the trial for January 5, 1983 at 2:00 p.m. (R.106) Mr. Collesides then sent appellant a letter, informing appellant of the trial date in the divorce action, January 5, 1983 (R.122).

After Mr. Colessides' withdrawal, appellant contacted Wayne B. Watson about representing him. On or about December 29, 1982, appellant received a letter from Mr. Watson informing him that Mr. Watson would not be available to try the case on January 5, 1983, and also informing appellant that according to Mr. Watson's investigation, the date of January 5, 1983 was a firm trial setting (R.123).

At no time did appellant receive any notice, either written or oral, of a change in the trial date (R.121). Notwithstanding the lack of notice to appellants, a trial in absentia was held on December 22, 1982, and appellant received a copy of the findings of fact and conclusions of law in this case on or about December 30, 1983. It was appellant's intention to appear in this matter with counsel, and to defend his interests therein (R.121).

That there was confusion over the date of the trial in this matter is evident by the opening comments of the court on December 22, 1982:

> THE COURT: The matter that's before the Court this morning is Rucker vs. Rucker, Civil No. 58,308.
>
> This matter was noticed for hearing this morning at 9:30 a.m. A notice to that effect went out, according to the certificate in the file to both Richard L. Maxfield, Attorney at Law, Counsel for Plaintiff and Dale E. Rucker, who is, at this point, pro se. His prior attorney withdrew. The Court allowed him to withdraw. Nick Colessides. The Minutes entry says that the trial was re-set for January 5th, 1983. Why do I see that?
>
> MRS. CHAPPLE (Deputy Clerk): Well, it was set for then. But you were going to be on vacation that week, so it was changed. (Tr.2)

Though respondent testified at trial that appellant was informed of the trial date of December 22, 1982, and that appellant had stated to her that he would be in court on that date such testimony was clearly without foundation (R.121).

Appellant, on January 5, 1983, moved the court to set aside the judgment and decree entered after the trial in absentia, based on the fact that his failure to appear at trial was due to mistake, inadvertance, surprise or excusable neglect, and further that he was prevented from appearing by the fraud, misrepresentation, or other misconduct of respondent (R.116). This motion was denied by the court (R.127).

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT AND DECREE, WHERE APPELLANT'S FAILURE TO APPEAR WAS THE RESULT OF SURPRISE OR EXCUSABLE NEGLECT; OR FRAUD OR MISREPRESENTATION OF OTHER PARTY.

Rule 60(b) Utah Rules of Civil Procedure, provides in pertinent part, that:

> On Motion and upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (7) any other reason justifying relief from the operation of the judgment.

Clearly, under this rule, the trial court should not act arbitrarily in denying a motion to set aside a default judgment, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled in conformity with law and justice. Mayhew v. Standard Gilsonite Co.,14 Utah 2d 52, 376 P.2d 941. Further, this court held in Mayhew, supra it is an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear and timely application is made to set aside. Supporting its holding in Mayhew, supra., setting aside a definite judgment rendered in a trial court, this Court stated that

> It is undoubtedly correct that the trial court is endowed with considerable latitude of discretion in granting or denying such motions. However, it is also true that the court cannot act arbitrarily in that regard, but should be generally indulgent toward permitting full inquiry and knowledge of disputes so they can be settled advisedly and in conformity with law and justice. To clamp a judgment rigidly and irrevocably on a party without a hearing is obviously a harsh and oppressive thing. It is fundamental in our system of justice that each party to a controversy should be afforded an opportunity to present his side of the case.[376 P.2d at 952(footnotes omitted)]

In Central Finance Company v. Kynaston, 22 Utah 2d 284, 45 P.2d 316 (1969), this court quoted with approval from Mayhew,supra.,in reversing the refusal of the trial court to set aside a default judgment where defense counsel, in his verified motion to set aside the default, attested that he had not received notice of trial. Further, this court also vacated a default judgment in Interstate-Excavating v. Agla Development, 611 P.2d 369 (1980). In Interstate Excavating, Supra, appellant did not receive notice of trial date from its attorney after the attorney's withdrawal from the case. The appellant did, however, immediately upon receipt of notice of default judgment, contact other counsel who thereafter proceeded with diligence to attack the default judgments. This court reasoned that under such circumstances the interests of justice would be best served by setting aside the default judgment.

Surely, then, under the instant facts, the default judgment rendered by the court below should be vacated.

Appellant received letters from two separate attorneys, one of whom had previously represented him in the divorce action in the court below, and one whom appellant had contacted about representing him in the matter. Both letters stated that trial in the divorce action in the court below would be on January 5, 1983. Appellant relied on this information, and intended to appear with counsel on January 5, 1983 got trial, since he received no notice of the change in trial date. Once he received a copy of the findings of fact and conclusions of law and decree in the matter rendered after the default hearing of December 23, 1983 appellant timely moved to set aside the judgment.

Therefore, consistent with this Court's decisions, appellant's mistake as to the date of the trial, based as it was on statements from two competent and able attorneys as to the trial date of January 5, 1983 being a firm date, was sufficient cause for setting aside the judgment and decree in the court below. The summary denial by the above court to set aside the judgment and decree was an abuse of discretion by that court.

In McKean v. Mountain View Memorial Estates, 17 Utah 2d 323, 411 P.2d 129 (1966), this Court, in setting aside a default judgment and remanding the case for trial on the merits, described the policy behind liberal application of procedural rules allowing for vacation of default judgments in holding that:

> The object to be desired in this as in all cases the searching out of the truth and doing justice between the parties in regard to the controversy between them. To carry out that purpose it is the policy of the law to favor a trial on the merits and to afford both sides a full opportunity to present their evidence and contentions as to disputed issues so they may be disposed of on substantial rather than upon technical grounds. Accordingly courts should exercise caution in regard to default judgments and should be somewhat indulgent in setting them aside.

In Helgesen v. Inyangumia, 636 P.2d 1079 (Utah, 1981), the court held that the trial court abused its discretion in refusing to set aside a default judgment, reasoning that:

> The decision to relieve a party from a final judgment under rule 60(b)(1) is subject to the discretion of the trial court. But discretion should be exercised in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing. Warren v. Dixon Ranch Co., 123 Utah 416, 260 P.2d 741 (1953). [636 P.2d at 1081]

636 P.2d at 1081. See 46 Am. Jur. 2d, Judgments.

Further, in Mendenhall v. Kingston, 610 P.2d 1287 (Utah 1980) this Court noted with approval the effect of Rule 60(b) of the Utah Rules of Civil Procedure:

> There is no doubt about the salutary purposes of Rule 60(b) to redress any injustices that may have resulted because of excusable neglect, or the wrongs of an opposing party. Nor that Rule 60(b) should be liberally construed to effectuate that purpose. [610 P.2d at 1289.]

While this Court has noted that this rule should be liberally applied, it has also held that for the trial court's refusal to vacate a valid judgment to be an abuse of discretion, public policy demands more than a mere statement the movant did not have his day in court. Public policy demands that the movant show that

he has used due diligence and that he was prevented from appearing by circumstances beyond his control. State in interest of Summers Children v. Wulffenstein, 560 P.2d 331 (Utah, 1977). In the instant matter, appellant has met this burden, since his failure to appear in court on December 22, 1982 was due to his honest and excusable mistake of believing the erroneous information he received from two well-respected and well-qualified attorneys.

This Court has also determined that, as a general proposition, one who seeks to vacate a default judgment must proffer some defense of at least sufficient ostensible merit as would justify a trial of the issue thus raised. Downey State Bank v. Major-Blakeney Corporation, 545 P.2d 507 (Utah, 1976). The trial courts, in the default judgment and decree, awarded to respondent all of the properties formerly owned by appellant and respondent during their marriage. Certainly, were appellant allowed to proceed on the merits, his interests would be better defended, and there is a substantial probability that appellant would be awarded more than merely his automobiles, mechanic tools, retirement income, and personal effects and belongings.

Not only would appellant's interests be better protected in a trial on the merits, but in addition, respondent would suffer no prejudice thereby. Respondent would be able to put on her evidence in an adversarial proceeding, and the matter would be determined in conformity with law and justice.

Under facts similar to those at issue here, the Oregon Supreme Court, in Hanthorn v. Oliver, 51 P. 440 (Ore., 1897) set

aside a default judgment on grounds of excusable mistake and honest misunderstanding by the defendant. In Hanthorn, supra, defendant was informed by his counsel on Monday the case was set for Tuesday, and, believing that Tuesday of the next week was intended, he attended at that time, and then, for the first time found that judgment had gone against him by default.

Other jurisdictions also consistently regard accident, surprise, or unavoidable casualty or misfortune as a sufficient ground to vacate a judgment. The New Mexico Supreme Court, in Springer Corporation v. Herrera, 510 P.2d 1072 (N.M., 1973) determined that "because courts universally favor trial on the merits, slight abuse of discretion in refusing to set aside a default judgment will often be sufficient to justify reversal of the order," 510 P.2d at 1074, and that the trial court must apply a liberal standard in determining (1) whether there is excusable neglect and (2) whether the defendants have a meritorious defense.

In Schulman v. Bongberg-Whitney Electric, Inc., 645 P.2d 43 (Nev., 1982) the Nevada Supreme Court held that the decision to grant or deny a motion to set aside a default judgment rests with the sound discretion of the trial court, and that such decision must not be arbitrary or cavalier but must be exercised within guidelines established by the State Supreme Court. One of those guidelines is that cases should be heard on the merits whenever possible.

Appellant submits that since his complete reliance on

erroneous information provided him by two respected attorneys as to the date of his trial is reasonable justification or excuse for his failure to appear at trial on December 22, 1983, the trial court abused its discretion in denying his motion to set aside the default judgment and decree rendered after the trial held in Appellant's absence.

In the alternative, appellant submits that his failure to appear at the trial on December 22, 1982 was due to the fraud, or misrepresentation of respondent. Respondent testified at the trial held in appellant's absence that appellant was informed of the December 22, 1982 trial date, and the appellant had stated to her that he would be in court on that date. Appellant, however, has by affidavit sworn that such statements are entirely without foundation.

The only evidence as to appellant's knowledge of the date scheduled for the trial of this matter in the lower court other than the statements of appellant and respondent are the letters of Mr. Colessides and Mr. Watson to appellant, indicating that the date of trial was to be January 5, 1983 at 2:00 p.m. Of particular importance is the fact that the letter from Mr. Watson is dated December 27, 1982, five days after the trial in absentia was held and only nine days before January 5, 1983. Mr. Watson, in his letter, stated that he checked the date of trial, and found that January 5, 1983 was a firm setting.

Respondent's testimony that appellant knew of the change in trial date is suspect, at very least, given both appellant's sworn

statement that he had no such knowledge, and the letters fr
counsel that the January date was a firm date.

At the very least, given the liberal policy of this Court
setting aside default judgments where one party has not be
allowed a hearing, appellant should be given the benefit of th
doubt here. Respondent's self-serving testimony as to appellant'
knowledge of the change in trial date is uncorroborated.
Appellant's sworn statement that he had no knowledge of the change
is corroborated by two letters from competent attorneys.

Appellant submits that, given the strong possibilities that
respondent misled the lower court and/or appellant to avoid
confrontation at trial, this court should set aside the default
judgment and decree rendered in the lower court.

CONCLUSION

Since appellant's failure to appear at the trial held in his absence on December 22, 1982 is justifiable and was completely based on circumstances beyond his control, the denial by the trial court of appellant's motion to set aside the default judgment was an abuse of discretion. In the alternative appellant prays for relief based on the fraud or misrepresentation of respondent.

For these reasons, appellant prays that this Court reverse the judgment below and remand the matter to the trial court for a trial on the merits.

Respectfully Submitted,

W. Andrew McCullough

Vernon F. Romney
Attorneys for Appellant

MAILING CERTIFICATE

Mailed 2 copies of the foregoing Brief of Appellant to Richard L. Maxfield, Attorney for Respondent, 60 East 100 South, Suite 100, Provo, utah 84601, this _____ day of May, 1983.